The Supreme Court in American Society

Equal Justice Under Law

Series Editor

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Series Contents

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Series Introduction

The inscription carved above the entrance to the Supreme Court of the United States is elegant in its brevity and powerful in its directness: "Equal Justice Under Law." No other words have been more regularly connected to the work of the nation's most important judicial tribunal. Because the Court is the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States, it functions as the preeminent guardian and interpreter of the nation's basic law. There was nothing, of course, in the early history of the Court that guaranteed that it would do just that. The justices in their first decade of operation disposed of only a handful of cases. During the subsequent two centuries, however, the Court's influence mushroomed as it became not only the authoritative interpreter of the Constitution but the most important institution in defining separation of powers, federalism, and the rule of law, concepts at the heart of the American constitutional order.

Chief Justice Charles Evans Hughes once declared that the Court is "distinctly American in concept and function." Few other courts in the world have the same scope of power to interpret their national constitutions; none has done so for anything approaching the more than two centuries the Court has been hearing and deciding cases. During its history, moreover, the story of the Court has been more than the sum of either the cases it has decided or the justices that have decided them. Its story has been that of the country as a whole, in war and peace, in prosperity and depression, in harmony and discord. As Alexis de Tocqueville observed in *Democracy in America*, "I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people." That power, as Tocqueville well understood, has given the justices a unique role in American life, one that combines elements of law and politics. "Scarcely any political question," Tocqueville wrote, "arises in the United States that is not revolved, sooner or later, into a judicial question." Through the decisions of the Supreme Court, law has become an extension of political discourse and, to that end, the rule of law itself has been embellished. We appropriately think of the high court as a legal institution, but it is, in truth, a hybrid in which matters of economics, cultural values, social change, and political interests converge to produce what we call our constitutional law. The Court, as a legal entity, speaks through the law but its decisions are shaped by and at the same time shape the social order of which it is part. All of

which is to say that, in the end, the high court is a human institution, a place where justices make decisions by applying precedent, logic, empathy, and a respect for the Constitution as informed by the principle of "Equal Justice Under Law." That the Court has at times, such as the struggle over slavery in the 1850s, not fully grasped all of the implications of those words does not, in the end, diminish the importance of the Court. Instead, it reminds us that no other institution in American life takes as its goal such a lofty aspiration. Given the assumptions of our constitutional system, that there is something like justice and freedom for all, the Court's operation is unthinkable without having the concept of the rule of law embedded in it.

As these volumes attest, interest in the Court as a legal, political, and cultural entity has been prodigious. No other court in the American federal system has drawn anything approaching the scholarly attention showered on the so-called "Marble Palace" in Washington, D.C. As the volumes in this series make clear, that scholarship has divided into several categories. Biographers, for example, have plumbed the depths of the judicial mind and personality; students of small group behavior have attempted to explain the dynamics of how the justices make decisions; and scholars of the selection process have tried to understand whether the way in which a justice reaches the Court has anything to do with what he or she does once on the Court. Historians have lavished particular attention on the Court, using its history as a mirror of the tensions that have beset American society at any one time, while simultaneously viewing the Court as a great stabilizing force in American life. Scholars from other disciplines, such as political science and law, have viewed the Court as an engine of constitutional law, the principal agent through which constitutional change has been mediated in the American system, and the authoritative voice on what is constitutional and, thereby, both legally and politically acceptable. Hence, these volumes also address basic issues in the American constitutional system, such as separation of powers, federalism, individual expression, civil rights and liberties, the protection of property rights, and the development of the concept of equality. The last of these, as many of the readings show, has frequently posed the most difficult challenge for the Court, since concepts of liberty and equality, while seemingly reinforcing, have often, as in the debate over gender relations, turned out to be contradictory, even puzzling at times.

These volumes also remind us that substantial differences continue to exist, as they have since the beginning of the nation, about how to interpret the original constitutional debates in the summer of 1787 in Philadelphia and the subsequent discussions surrounding the adoption of the Bill of Rights, the Civil War amendments, and Progressive-era constitutional reforms. Since its inception, the question has always been whether the Court , in view of the changing understandings among Americans about equality and liberty, has an obligation to ensure that its decisions resonate with yesterday, today, tomorrow, or all three.

Volume Introduction

The First Amendment to the Constitution declares that "Congress shall make no law . . . abridging freedom of speech, or of the press." Those words are among the most important in the American constitutional tradition, for they have come to mean that government officials, including state officials since the first quarter of the twentieth century, cannot restrict the public debate about public affairs. Moreover, in recent times the idea has grown that just as government cannot restrict what is printed and spoken it cannot intrude into the lives of individuals to find out what they are thinking or what they might propose to write. In short, as Justice Louis Brandeis once observed, there is a constitutional right, nowhere mentioned in the Constitution, to be left alone.

Although the First Amendment was adopted as part of the Bill of Rights in 1791, the interpretation of it by the Supreme Court did not begin to take place until World War I. Moreover, not until 1925, in *Gitlow* v. *New York*, did the justices conclude that state as well as federal governments could be prohibited from restricting free expression. Yet the most significant case law involving expression dates from 1960, when the justices began to decide a long string of cases involving libel, privacy, prejudicial pretrial publicity, access to courts, cameras in the courtroom, the right of reply to comments in print and in the media, the meaning of commercial speech, and the protection to be afforded to confidential news sources. As the articles in this volume remind us, the high court has relied in all of these areas on a wide variety of tests and legal constructs to decide these controversies. Government, for example, carries an unusually heavy burden in attempting to restrict expression, and it can do so only through content-neutral restrictions on the time, place, and manner of speech. Even then, the government has to prove that it has a substantial interest in doing so, not merely as a matter of convenience. The result is that the concept of expression means substantially more today than was true at the framing of the nation.

The same is true of the concept of privacy. As Justice Hugo Black wrote in *Griswold* v. *Connecticut* (1965), "[p]rivacy is a broad, abstract, and ambiguous concept." That means that privacy as a constitutional concept has been at once protean and controversial. It also means, as the essays dealing with privacy in this section remind us, that political freedom depends on privacy and that the "right to privacy," which is nowhere explicitly contained in the Constitution, will remain central to the work of the justices. It also means, as is true with the history of expression, that the meaning and scope of privacy will always be in constitutional flux.

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Conscience, Expression, and Privacy

CIVIL LIBERTIES AND THE AMERICAN SUPREME COURT

LOREN P. BETH[1]
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JUDICIAL review is an American invention, even if it is no longer uniquely an American practice. It is an invention which British observers have often regarded as unnecessary or even pernicious. But many British scholars, like Lord Bryce, Henry Sidgwick, Professor Wheare, and even Professor Brogan at times, have seen in it an institution which while perhaps not suited to the British political mind, is not only suitable but possibly even essential in the American system. Together with federalism it is the most distinctive (and some would add, the most significant) American contribution to the art and science of government

Nevertheless, judicial review has often been criticized both in principle and in application by the Americans themselves, and there are even judges on the Supreme Court bench who have at times expressed implicitly some regret that such an institution has been fastened barnacle-like to the American ship of state. The criticisms are perhaps too well known to need restatement here. On the contrary, it is the purpose of this paper to attempt a defence of judicial review: a task which no American liberal would have essayed twenty years ago and which is even today to some extent an uncongenial enterprise. I am concerned with what is nowadays (in America) a rather conservative position: the view that the Constitution is a body of limitations upon the proper actions of government—limitations which in the American experience we cannot entirely trust our governments to observe. Indeed, it is possible that the trials through which the world has gone in the past fifty years indicate that a well-established and popularly accepted system of judicial review is a desirable part of the institutions of any country which uses a democratic written constitution as the basis of its politics.

It is unfortunate that the Supreme Court has itself made the use of the constitutionalist approach difficult by frequently going beyond the proper limits of judicial review. During the period in which both federal and state

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Political Studies, Vol. VI, No. 2 (1958, 134–146).

laws were most frequently invalidated by the Court, the reasons given were almost always based on some imagined economic doctrine which, search as one will, one cannot find in the words of the Constitution or even in its spirit. The application of this doctrine of *laissez-faire* during the years from 1870 to 1937 involved the inversion of the Constitution. Instead of enforcing the limitations contained therein, the Court found implied limits on the powers granted. As often as not it refused to enforce the proper limitations while at the same time dreaming up its own.

Against such perversions of judicial review liberals like Justice Brandeis, and later Franklin Roosevelt and Felix Frankfurter, reacted strongly. At times they reacted not only against the perversion but against the institution itself, assaulting, as it were, not only the King but the Crown. Both the perversion and the consequent reaction culminated in the New Deal period, during which the Court regularly frustrated New Deal aims by failing to find in the Constitution's grants of power to the federal government any power to do those things which the New Dealers felt were both necessary and constitutional.

During most of the same period (1870–1937) the Supreme Court was just as resolutely refusing to protect citizens against governmental actions infringing their civil rights and liberties. It completely failed to protect negroes in the exercise of their newly won rights as citizens after the Civil War. At the same time it denied court protection to various assorted socialists, anarchists, and persons denied fair trials in state courts. It was not until the 1930's that the Supreme Court began to take an affirmative interest in such matters.

The watershed of 1937 brought a pronounced change in the Court—a change which has been reflected in the issues which have come before it. The 'switch in time that saved nine' performed by the judges in that year meant, fundamentally, that the Court was no longer prepared to read grants of power as if they were limitations on power: it was instead ready to allow both federal and state governments relatively free hands to deal with economic questions. This shift made the litigation of cases involving the constitutionality of economic legislation unprofitable for the business interests, and there is comparatively little such litigation today. Neither federalism nor substantive due process has been used to limit the reach of governmental economic regulation since 1937.

At the same time the fears of conservatives that the New Deal was socialistic or even communistic combined with the war and its cold war legacy to produce a rash of state and federal laws imposing new limits on the private freedoms of American citizens; and an awakening public conscience demanded that the negro be assured his rights as a first-class citizen. Whatever one's conclusions as to decisions in particular cases, no

one can rightly say that the Supreme Court has not given its careful attention to these new types of cases, which have in fact become the major proportion of cases involving the constitutionality of state and federal laws.

This significant shift in emphasis was not achieved without a good deal of soul-searching among liberals both on and off the Court. After all, it was the liberals who had been most prominent in attacking the uses to which judicial review had been put during the preceding half-century; and while most of them did not go to the extreme of denying the existence of the power of review, yet like Justice Frankfurter they felt that it was the duty of judges to be passivists in the political struggle. They wished to be absolutely sure that they were not substituting their own judgements of wise policy—in the guise of constitutional law—for the decisions of the 'political' branches of the government. But it seemed logical to them that if judges cannot be activists in economic cases, such as those which confronted the courts in the twenties and thirties, they cannot be activists in any field; and if government should be allowed a free hand to deal with economic problems, so it should also in all other problems. And thus even judges who believed strongly in civil liberties and wished to try to preserve them, felt a certain ambivalence in their attempts to do so. The situation has been well summarized by Professor Earl Latham in the following words:

> . . . [T]he abdication of social and economic policy to legislative majorities has seriously handicapped the effort to retain decisive judicial control in the field of civil liberty. We are all familiar with the ambivalent approach of the judges in the cases involving social and economic legislation and those involving civil liberties. In the first the Court assumes that the statutes are constitutional, and the principal question is whether the federal statute has priority over the state or whether unused federal power is threatened in any way by state enactments. In the second, the statute is assumed to be unconstitutional and something like a doctrine of emergency power to act has been worked out. But why should judges defer to the majority desire for social and economic legislation and resist the majority desire for legislation that curbs activities thought by the judges to be within the domain of civil liberties? The judges have so far failed to work out a satisfactory rationale for the ambivalent approach; much of their confusion and consternation with each other stems from this failure.[1]

This problem, it should be emphasized, has faced American liberals rather than conservatives. Conservatives had never been especially opposed to judicial review in economic cases, since they could use it to protect their own positions. And many of them were afraid of the New Deal and its 'socialistic drift' so that they were not concerned by the possible diminution of civil liberty: many of them were, in fact, leading McCarthyists. Liberals,

[1] Earl Latham, 'The Supreme Court and the Supreme People', *Journal of Politics*, May 1954, pp. 207–35.

on the other hand, believed in the welfare state—a belief which necessitated a broad reading of the constitutional grants of power to the federal government, and a tolerant hands off attitude by the courts. But they also had a strong emotional attachment to the traditional liberal values contained in the Bill of Rights. So the very men who in the thirties had called for a relatively unlimited legislative power in the hands of Congress and the states, now were in the strange position of asking the courts to place distinct limits on these powers.

Professor Latham, however, exaggerates the difficulty of this liberal dilemma. There are, in fact, at least two ways of justifying the liberal position. One is to state frankly the belief that civil liberties are so important to human beings and (more significant) to the maintenance of a democratic system of politics, that their infringement cannot be countenanced without a clear showing of governmental necessity. Such an argument would presumably make use of John Milton and J. S. Mill; it has been ably developed on the U.S. Supreme Court bench by Justice Hugo Black. However, it suffers in use by a court by the fact that it is not a constitutional argument except in a tenuous sense. It is, in other words, a tenable position only for the liberal who is not at the same time a judge wielding the power of judicial review, which must by definition be used only with reference to constitutional provisions.

The second justification is at the same time more obvious and more in keeping with proper canons of constitutional construction. It involves a close look at the American Constitution in the light of what a constitution *is*, and also of what this particular constitution *says*. It thus involves both a concept of constitutionalism and a principle of constitutional interpretation.

Constitutionalism can be used in various ways; Locke used it to justify a revolution, Burke to oppose one. The Americans, however, have always been better followers of Locke than of Burke, and they justified their own revolt against English authority in terms largely drawn from Lockian doctrine, as the words of the Declaration of Independence indicate:

> We hold these truths to be self-evident, That all men are created equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty & the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

And,

> . . . [W]hen a long train of abuses & usurpations pursuing invariably the same

object evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government and to provide new guards for their future security.

The idea of popular consent expressed in these passages is not of present concern; instead the interest lies in the plain assumption that there are limits to governmental power, for the word 'usurpation' can have no other meaning. Constitutionalism in itself provides no remedy for usurpation, since the right of revolution is not an integral part of constitutional theory. But it does include the simple idea that the usurpation of powers is a moral wrong for which *some* remedy should be found. Revolution, however, as Jefferson states elsewhere in the Declaration, is not a thing to be undertaken lightly or frequently; it is so drastic a remedy that it must be reserved for drastic usurpations. Yet what checks short of revolution are possible? One, obvious in the light of American history, is the use of a legal check such as judicial review provides.

Judicial review is, perhaps, as implicit in the British Constitution as in the American (Chrimes, for instance, points out that there is no legal provision binding English judges to apply Parliamentary acts);[1] but because of the lack of a written statement of limitations which courts could apply it cannot be made explicit: thus the doctrine of parliamentary supremacy (in which, it seems, few Britishers really believe, for it includes the possibility of acts which they cannot conceive as being proper). With a written constitution—more especially one which does contain explicit prohibitions on the use of government power—judicial review is a logical development. (Unless, indeed, the constitution itself denies the power of review to the courts, as does the Swiss constitution when it states that the legislature shall be supreme.) However, Professor McIlwain in his various works has gone so thoroughly into the concept of constitutionalism that it seems profitless to repeat it here. To those who are familiar with the American Constitution it will be obvious that if constitutionalism does include this idea of limitations on government the American document is probably the world's first written charter which makes a clear attempt to put the doctrine into practice. The Bill of Rights, and the various other specific prohibitions scattered through the Constitution, are the American statement of the proper limits to government action. Most of these provisions are what are popularly called 'civil' rights and liberties. The freedoms of the mind contained in the First Amendment are the most obvious, but the attempts to limit courts and police in their dealings with citizens are perhaps as important.

If it follows the tradition of constitutionalism, then, a written constitu-

[1] S. B. Chrimes, *English Constitutional History*, p. 6.

tion must contain such limitations; and it must be expected that the government will observe the defined limits, unless one is to regard their statement as mere verbiage. How they are to be maintained in the face of an unwilling government is another question; the American political system regards the courts as the proper agency for so doing, and considering the common law tradition of the United States this is certainly not an illogical development.

One can always clinch an argument in the United States by referring to the doctrines of Madison and Jefferson, the one as 'the father of the Constitution' and the other as patron saint of both political parties. And oddly enough, though both men have been famous as opponents of judicial review, it seems almost certain that they would have agreed with the general tenor of the foregoing analysis. Both men are on record as having made very similar statements in reference to the Bill of Rights, which taken together with their general attitudes on judicial review indicate that they believed that constitutional limitations are more than mere hortatory symbols, and that the courts could properly enforce them through legal channels. Jefferson, for instance, wrote:

> In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent and kept strictly to their own department merits great confidence for their learning and integrity. In fact what degree of confidence would be too much for a body composed of such men as Wythe, Blair and Pendleton? On characters like these the *civium ardor prava jubentium* would make no impression.[1]

Madison likewise, in arguing before Congress for the adoption of the Bill of Rights, remarked that the 'independent tribunals of justice would become [its] special guardians. The federal courts would be an impenetrable bulwark against every assumption of power.'[2]

Complementing the argument that constitutionalism justifies, if it does not indeed require, judicial review in cases where violations of constitutional limitations are charged, are two logical and relevant rules of constitutional interpretation. One is the mere fact that in construing a constitution one is always obliged to pay more attention to what is said than to what may be implied although left unsaid. In justifying judicial activism in civil liberties as against restraint in economic cases this rule of construction has great utility, for while the Constitution is quite specific in denying government the power to infringe freedom of speech or religion, or to deprive

[1] Jefferson to Madison, 15 Mar. 1789. Reprinted in *Basic Writings of Thomas Jefferson*, ed. Philip S. Foner, p. 577.

[2] Quoted in Irving Brant, *James Madison, Father of the Constitution 1787–1800*, pp. 266–7.

persons of the essential elements of a fair trial, it has surprisingly little to say (either affirmatively or negatively) about the proper role of government in the economy. While it is true that the Constitution-makers were firm believers in the institution of private property and were indeed writing the document partly as a means of protecting their own holdings of that precious commodity, the fact remains that they left the protection of property primarily to the working out of the institutional arrangements they were creating. The federal system and the bicameral legislature were particularly designed for this purpose. There is no provision of the Constitution which can be said to institute a Constitutional system of *laissez-faire* economics. There are only three important economic prohibitions contained in the Constitution: the clause which prohibits state governments from 'impairing the obligation of contracts', the Fifth Amendment provision requiring the federal government to give 'just compensation' for the taking of private property for public use, and the clauses of the Fifth and Fourteenth Amendments which prohibit federal and state governments from depriving any person of property 'without due process of law'. Only by highly ingenious and dubious implied constructions can any of these, or all of them together, be taken to limit seriously the power of authority to regulate business or the economy in general.

This is doubtless what Chief Justice Stone had in mind when he accomplished what Professor Latham regards as the 'ambivalent' feat of believing in judicial restraint and judicial activism at the same time. Stone is well known for his comment in one of the New Deal cases that the only check upon the power of the Supreme Court is its own 'sense of self-restraint'.[1] But a few years later, when the issue was not the regulation of agriculture but the requirement of a flag salute as against religious scruples, he wrote:

> The very fact that we have constitutional guarantees of civil liberties and the specificity of their command where freedom of speech and of religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that these liberties be protected against the action of government itself.[2]

It is, then, the difference between a specific prohibition and one which is at best implied which is crucial. No court can rightly invent prohibitions; but it has a duty to apply those which exist.

A second rule of constitutional construction, flowing from the above, requires that affirmative grants of governmental power in a constitution ought to be broadly construed so as to give the government the maximum

[1] *U.S.* v. *Butler*, 297 U.S. 1 (dissenting opinion).
[2] *Minersville School District* v. *Gobitis*, 310 U.S. 586 (dissenting opinion).